NO. 90-1912

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

STEPHANIE NORDLINGER,
Petitioner,

v.

KENNETH HAHN, et al.,
Respondents.

On Writ of Certiorari
to the Court of Appeal
of the State of California

BRIEF OF AMICUS CURIAE WILLIAM K. RENTZ ON THE MERITS IN SUPPORT OF PETITIONER STEPHANIE NORDLINGER

WILLIAM K. RENTZ, Counsel of Record
Attorney at Law
242 Moore St.
Santa Cruz, CA 95060
(408) 755-5366

Amicus Curiae, in propria persona

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William K. Rentz submits herewith his Brief of Amicus Curiae on the Merits in support of Petitioner Stephanie Nordlinger's claim that California's Proposition 13 is unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment.

I. INTEREST OF AMICUS CURIAE.

The interest of Amicus Curiae William K. Rentz in this matter has been set forth

previously in the Brief of William K. Rentz in Support of Petition for Writ of Certiorari (WKR Amicus Brief I), pages 1-2.

II. SUMMARY.

This case challenges the validity of the basic formula decreed by Article XIII A of the California Constitution (Proposition 13 on the 1978 ballot) for the computation of real property taxes throughout the state of California. Stephanie Nordlinger, the petitioner herein, contends, and this amicus curiae supports her contention, that the use of the Proposition 13 tax computation formula to determine property taxes year after year in an inflationary economy violates the requirements of equal protection embodied in the 14th Amendment to the U.S. Constitution.

The purpose of this brief is to complete the arguments begun in the Brief of William K. Rentz in Support of Petition for Writ of Certiorari (WKR Amicus Brief I). The present brief, therefore, must be read

in conjunction with that earlier brief. In this brief, this amicus curiae highlights several of the extraordinary aspects of the Proposition 13 inequalities and explains why the California Supreme Court's analysis of Proposition 13 in Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 149 Cal.Rptr. 239, 583 P.2d 1281 (1978), in which the court characterized Proposition 13 as a tax system that treats all taxpayers in the same manner, makes Amador Valley valueless as precedent in this case. After a brief explanation of the traditional test used in equal protection cases, this amicus then shows how the justifications offered for Proposition 13 fail to support the Proposition 13 inequalities, and therefore, why Amador Valley must be disapproved and why the lower court in this case must be reversed.

III. THE INEQUALITIES BROUGHT ABOUT BY PROPOSITION 13 ARE EXTRAORDINARY.

A. In any given tax year, California has now approached the point where in some parts of the state all current year buyers will pay higher taxes than any 1975 buyers.

As pointed out in the brief by this amicus curiae in support of the petition for writ of certiorari, Proposition 13 treats all current-year property taxpayers differently by assigning to them different tax computation dates and different standards for the tax amounts they will pay (WKR Amicus Curiae Brief I, pages 4-7). As a result, the homeowners who bought their property in 1991, on average, pay much higher taxes than the homeowners who bought in 1975. This is so because the average 1991 home price is much higher than the average 1975 home price.

In some parts of the state, however, it is coming close to the point where it is no longer merely a question of differences between average taxes -- in these parts of the state, if you bought your home in 1991, your tax will likely be, absolutely, higher

than any tax paid by any 1975 home buyer. This is so because in these parts of the state, the cheapest homes available now are more expensive than the most expensive homes available in 1975, and the taxes differ accordingly. The photographs included in Petitioner's brief in support of her Petition for Writ of Certiorari, at pages 9-10, demonstrate this sobering reality.

B. The Proposition 13 inequalities are the fortuitous result of inflation.

In a static economy, there would be no inequalities under Proposition 13: Mr. Jones buys a house in 1975 for $50,000, and Mr. Green buys an identical house in 1991 for $50,000; and their taxes in 1991 are the same under Proposition 13. In an inflationary economy, however -- in the real world -- the price of Mr. Green's 1991 acquisition is closer to $250,000, and his taxes far exceed Mr. Jones' taxes. The factors that influence inflation are so numerous and so complicated as to be totally beyond the control of any individual, and even beyond the control of governments and large

economic institutions. The rate of inflation varies -- sometimes inflation is rapid, sometimes slow, sometimes there is even temporary deflation. All of this is unpredictable and for all practical purposes fortuitous. This means that the difference between the taxes paid by Mr. Jones and Mr. Green is likewise fortuitous. The real estate market could remain relatively stable for several years, resulting in only a small difference between the taxes of Jones who buys at the beginning of the stable period and Green who buys at the end. On the other hand, the real estate market could inflate rapidly in a period of six months, resulting in a large difference between the taxes of those buying at the beginning and those buying at the end of that six month period

There is no governmental purpose or policy inherent in Proposition 13 which suggests that these inequalities should occur in this manner. On the contrary, the existence and size of these inequalities are purely and simply the result of the

inflation lottery.

C. <u>The Proposition 13 inequalities worsen as time passes.</u>

Amicus curiae Howard Jarvis Taxpayers Association suggests that, even if there is an "appearance" of inequality in any given tax year, nevertheless, over the long run, Proposition 13 in an inflationary economy treats all taxpayers the same. See Brief Amicus Curiae of Howard Jarvis Taxpayers Association and Paul Gann's Citizens Committee in Opposition to Petition for Certiorari (HJTA Amicus Brief I), at pages 13-14:

> "Every new buyer anticipates moving through a pattern of declining reassessment relative to the then current market value of his or her property as the years pass. All are treated equally in the sense that all begin at 100% of market value and progressively shift to lower and lower assessments relative to the then current market value. Whatever the initial tax 'disadvantage' a new owner appears to have, relative to his or her neighbor, is made up as time goes on."

There are at least three serious defects in this statement.

First, it ignores the mathematical fact that, as inflation drives the price of

housing up from one year to the next, the difference between the taxes paid by the 1975 buyers and by the most current buyers constantly increases. The Jarvis organization's logic speaks for itself in light of this fact.

Second, the Jarvis organization's statement ignores one of the key facts about inflation -- that it is random and uneven. Thus, even assuming that the inequality inflicted upon one set of current buyers is justified by the greater inequality inflicted on a later set of current buyers -- the fact remains that not everyone will receive even that meager benefit. Housing prices go up rapidly in some years, slowly in other years. Those who buy at the beginning of a long period of rapid inflation quickly become the beneficiaries of the Proposition 13 inequalities, soon finding themselves in the lower tax ranges. On the other hand, those who buy at the beginning of a long period of stable prices find themselves caught for a long time in the

highest tax range. There is nothing equal about this.

Third, the Jarvis organization's statement ignores a basic fact about peoples' lives: not everyone follows the same path in life. If everyone bought a house at age 20 and held onto it until their death at age 65, one could see how, at least theoretically, inflation could treat all people in the manner described by the Jarvis organization. But everyone does not buy at age 20 or die at age 65. Death, divorce, lost jobs, slowness in achieving prosperity, and a whole host of other circumstances make it impossible for some people to buy a home early in their life and hold onto it long enough to become the beneficiaries of the Proposition 13 inequalities. Meanwhile, fortune smiles on others, enabling them to buy early and hold on long so as to reap those benefits. Inevitably, the holding periods for homes will vary widely, and therefore, the extent to which individuals will over time become the beneficiaries of

the Proposition 13 inequalities will likewise vary.

In light of these considerations, it is clear that the passage of time does not alleviate the "apparent" inequalities that occur in any given tax year. On the contrary, the passage of time only makes more obvious the real, ever-present, and ever-increasing nature of those inequalities.

IV. THE DESCRIPTIONS OF PROPOSITION 13 THAT FOCUS ON THE WAYS THAT PROPOSITION 13 TREATS PEOPLE EQUALLY HAVE NO BEARING ON THE PRESENT CASE.

In Amador Valley, the court found a way to describe Proposition 13 as treating all taxpayers in precisely the same manner. See 22 Cal.3d at 235 and WKR Amicus Brief I, at pages 21-25. In essence, the Amador Valley court said that Proposition 13 treats all taxpayers equally because it applies the same rule to all taxpayers. It is indeed quite true that Proposition 13 applies the same rule to all taxpayers. But a similar statement can be made about practically any

law that legitimately or illegitimately discriminates between groups. That statement ignores the fact that once the Proposition 13 rule is applied "equally" to all taxpayers, it has the effect of dividing all those taxpayers into different classifications, with the result that some pay low taxes while others pay high taxes. Thus, while it is possible to identify one aspect of Proposition 13 that reflects equal treatment of taxpayers, nevertheless, the stark inequalities described by petitioner still remain and still must be justified. The one aspect showing equal treatment is simply irrelevant to that task. In light of other cases decided by this court, it is clear that any attempt to justify one inequality by pointing out that the offending statute treats people "in exactly the same manner" in some other respect is doomed to failure. Williams v. Vermont, 472 U.S. 14, 27, 86 L.Ed..2d 11, 105 S.Ct. 2465, 2474 (1985); see also Rinaldi v. Yeager, 384 U.S. 305, 308, 16 L.Ed.2d 577, 86 S.Ct. 1497,

1499 (1966) (equal protection requires more than just non-discrimination within the class created).

V. AMADOR VALLEY'S FAILURE TO ADDRESS ITS JUSTIFICATION EFFORTS TO THE UNEQUAL TREATMENT MAKES IT DISTINGUISHABLE FROM THE PRESENT CASE.

In his earlier brief (WKR Amicus Brief I, at pages 25-26), this amicus pointed out that the failure of Amador Valley to address its justifications for Proposition 13 to the unequal treatment made Amador Valley distinguishable from the present case, and promised to discuss this point in greater detail. Here is that discussion.

A. General principles of stare decisis require that Amador Valley be distinguished.

The principle that would give a controlling effect to the Amador Valley case is, of course, the principle of stare decisis. See Auto Equity Sales, Inc. v. Superior Court, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 232-24, 369 P.2d 937 (1962). That principle holds, in a general way, that an appellate court decision in one case is

binding on the lower courts in subsequent cases, where the factual and legal issues in the second case are the same as in the first. To understand this principle more clearly, however, it is helpful to compare the principle of stare decisis with the principle of collateral estoppel.

Under the principle of collateral estoppel, a judgment is given broadly conclusive effect between parties to a lawsuit in subsequent disputes between the same parties over the same matter: the judgment is binding on the parties as to all issues that could have been raised, even when some of those issues were not in fact raised by the parties or considered by the court. See Evans v. Celotex Corp., 194 Cal.App.3d 741, 744, 746-47, 238 Cal.Rptr. 259, 261-62 (1987); Frommhagen v. Board of Supervisors, 197 Cal.App.3d 1292, 1301, 243 Cal.Rptr. 390, 394-95 (1987); and Takahashi v. Board of Education, 202 Cal.App.3d 1464, 1481, 249 Cal.Rptr. 578, 589 (1988).

By contrast, the conclusive effect given by the principle of stare decisis is much narrower: an appellate court opinion has precedential effect only as to those issues that were actually presented and decided by the court. See Santa Monica Hospital Medical Center v. Superior Court, 203 Cal.App.3d 1026, 1033, 250 Cal.Rptr. 384, 388 (1988); Bryant v. Superior Court, 186 Cal.App.3d 483, 495-96, 230 Cal.Rptr. 777, 785 (1986). Under the doctrine of stare decisis, the two cases could be factually very similar, in an overall sense; but what matters in terms of ascertaining the precedential value of the first case are the facts that were material to the court's decision in that case. If the second case raises issues involving different facts taken from the same overall set, and if these different facts evoke different legal considerations, then the first case, despite the overall similarities, will have no conclusive or precedential effect on the second. Issues that could have been raised

in the first case, but which were not raised, are left open for resolution in the second case. Avner v. Longridge Estates, 272 Cal.App.2d 607, 614, 77 Cal.Rptr. 633, 639 (1969) (discussing the case of Beck v. Bel Air Properties, Inc., 134 Cal.App.2d 834, 286 P.2d 503 (1955)).

In an overall sense, the facts involved in this present Proposition 13 case are similar to the facts involved in Amador Valley. However, Amador Valley did not deal with the precise issue involved here, because it did not attempt to justify those aspects of Proposition 13 which involved unequal treatment. Rather, Amador Valley focused its efforts on justifying those aspects of Proposition 13 which it characterized as treating everyone in precisely the same manner. Thus, even though Amador Valley could have dealt with the issue of whether the unequal treatment could be justified, it did not, and it is therefore distinguishable and cannot be used as precedent in this case.

B. McLaughlin v. Florida makes Amador Valley clearly distinguishable.

Pace v. Alabama (1883) 106 U.S. 583, 27 L.Ed. 207, 1 S.Ct. 637, and McLaughlin v. Florida, (1964) 379 U.S. 184, 189-91, 13 L.Ed.2d 222, 226-28, 85 S.Ct. 283, together demonstrate most clearly why Amador Valley's failure to direct its justification efforts at the unequal treatment distinguishes it significantly from the present case.

In Pace, the court considered an equal protection challenge to a statute that punished interracial adultery more severely than same-race adultery. The court found a way to describe the situation so that it looked as though all persons were treated the same: the court pointed out, with complete accuracy, that all blacks who violated the statute were treated the same as all whites who violated the statute, and furthermore, all blacks involved in same-race adultery were treated the same as all whites involved in same-race adultery. With this description firmly in its focus, the court simply ignored the fact that inter-

racial couples were treated differently from same-race couples, made no effort to determine whether the unequal treatment of interracial and same-race couples was justified, and found no violation of equal protection. 106 U.S. at 583-85, 27 L.Ed. at 207-8, 1 S.Ct. 637.

Eighty-one years later, in McLaughlin, the court considered an essentially identical statute against an equal protection challenge. Pace was offered as precedent for a decision finding no equal protection violation. Here, the court began by putting firmly into its focus the fact that interracial couples were treated differently from same-race couples. 379 U.S. at 188, 13 L.Ed.2d at 226, 85 S.Ct. 283. The court then analyzed Pace, to determine whether Pace was controlling authority for its decision. The court found that Pace was distinguishable and was therefore not controlling authority (379 U.S. at 191, 13 L.Ed.2d at 228, 85 S.Ct. 283:

> "Judicial inquiry under the Equal Protection Clause, therefore, does not

> end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose -- in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded. That question is what Pace ignored and what must be faced here."

On the question of time-based inequalities, the Amador Valley court's approach was exactly analogous to the Pace court's approach to race-based inequalities. Both courts found a way to describe the situation accurately so as to convey the impression that there was no substantial unequal treatment. Both courts then ignored the description that would have identified the inequalities, and both courts then, naturally enough, neglected to determine whether the ignored inequalities could be justified. As in McLaughlin, however, the lower court in this case should have found the earlier case to be distinguishable. The lower court erred in resting its equal protection decision on Amador Valley.

VI. THERE IS NO JUSTIFICATION FOR THE PROPOSITION 13 INEQUALITIES.

This court must now consider whether there is any sufficient justification for the Proposition 13 inequalities. In a brief filed earlier in this case, this amicus has shown how two purposes offered in Amador Valley to support Proposition 13 fail to justify the Proposition 13 inequalities. See WKR Amicus Curiae Brief I, pages 27-34. There are more justifications that have been offered, in Amador Valley and in this case; and these, likewise, fail to survive the test. First, however, a brief summary of the traditional test for determining whether unequal treatment can be justified is in order.

A. The traditional test for evaluating unequal treatment has several different formulations.

The traditional test for evaluating unequal treatment has been stated by this court in several ways. In essence, though, all these versions are but different ways of describing the same test.

The simplest formulation of the test requires that the different treatment, the discrimination, or the classification used to accomplish the different treatment have "a rational basis," or that it be "reasonable." Gregory v. Ashcroft, __ U.S. __, 115 L.Ed.2d 410, 430, 111 S.Ct. 2395, 2406 (1991); Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336, 102 L.Ed.2d 688, 697, 109 S.Ct. 633 (1989); Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356, 360, 35 L.Ed.2d 351, 93 S.Ct. 1001, 1004 (1973); Dandridge v. Williams, 397 U.S. 471, 485, 25 L.Ed.2d 491, 90 S.Ct. 1153, 1161 (1970); McGowan v. State of Maryland, 366 U.S. 420, 425-26, 6 L.Ed.2d 393, 81 S.Ct. 1101, 1105 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 55 L.Ed. 369, 377, 31 S.Ct. 337, 340 (1911).

A second formulation requires that the different treatment, discrimination, or classification "rationally promote or further a legitimate state interest." Hooper v. Bernalillo County Assessor, 472

U.S. 612, 618, 86 L.Ed.2d 487, 105 S.Ct. 2862, 2866 (1985); Williams v. Vermont, 472 U.S. 14, 22-23, 86 L.Ed.2d 11, 105 S.Ct. 2465, 2471 (1985); Zobel v. Williams, 457 U.S. 55, 60, 72 L.Ed.2d 672, 102 S.Ct. 2309, 2313 (1982); Schweiker v. Wilson, 450 U.S. 221, 235, 67 L.Ed.2d 186, 101 S.Ct. 1074, 1083 (1981). This formulation could be somewhat misleading. If one omits the word "rationally" from this formulation of the test, or if one minimizes the importance of that word, then this test becomes merely one of several elements that must be present in order to pass the traditional test. See below, at pages 28-30. However, in Schweiker, supra, the court made it plain that under this formulation of the test, the discrimination must advance a legitimate legislative goal "in a rational fashion." 450 U.S. at 234, 67 L.Ed.2d at 197-98, 101 S.Ct. at 1082.

A third formulation requires that the different treatment, discrimination, or classification "must rest upon some ground

of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Kahn v. Shevin, 416 U.S. 351, 355, 40 L.Ed.2d 189, 94 S.Ct. 1734, 1737 (1974); Reed v. Reed, 404 U.S. 71, 76, 30 L.Ed.2d 225, 92 S.Ct. 251, 254 (1971); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527, 3 L.Ed.2d 480, 79 S.Ct. 437, 441 (1959); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 64 L.Ed. 989, 40 S.Ct. 560, 561-62 (1920).

The fourth formulation requires that the different treatment, discrimination, or classification "must bear a rational relationship to a legitimate governmental purpose." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 440, 87 L.Ed.2d 313, 105 S.Ct. 3249, 3254 (1985); Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 875, 84 L.Ed.2d 751, 105 S.Ct. 1676, 1680 (1985); Schweiker v. Wilson, 450 U.S. 221, 230, 67 L.Ed.2d 186, 195, 101 S.Ct. 1074, 1080-81 (1981); City of New

Orleans v. Dukes, 427 U.S. 297, 303, 49 L.Ed.2d 511, 96 S.Ct. 2513, 2517 (1976); U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 533, 37 L.Ed.2d 996, 93 S.Ct. 2821, 2825 (1973); Reed v. Reed, 404 U.S. 71, 76, 30 L.Ed.2d 225, 92 S.Ct. 251, 254 (1971); Matthews v. Lucas, 427 U.S. 495, 509-510, 49 L.Ed.2d 651, 96 S.Ct. 2755, 2774 (1966).

Under all of these formulations, it is clear that states have "wide latitude," "large leeway," or "wide discretion" within which to adopt classifications. "Mathematical nicety" and "scientific precision" are not required of any classification, and there is room for "rough accommodations" and for much "play in the joints." See, first, Lehnhausen, supra, 410 U.S. at 360, 35 L.Ed.2d 351, 93 S.Ct. at 1004; Dandridge, supra, 397 U.S. at 485, 25 L.Ed.2d 491, 90 S.Ct. at 1161; second, Williams v. Vermont, supra, 472 U.S. at 22-23, 86 L.Ed.2d 11, 105 S.Ct. at 2471; third, Kahn, supra, 416 U.S. at 355, 40 L.Ed.2d 189, 94 S.Ct. at 1737;

Allied Stores of Ohio, supra, 358 U.S. at 527, 3 L.Ed.2d 480, 79 S.Ct. at 441; and fourth, City of Cleburne, supra, 473 U.S. at 440, 87 L.Ed.2d 313, 105 S.Ct. at 3254; City of New Orleans, supra, 427 U.S. at 303, 49 L.Ed.2d 511, 96 S.Ct. at 2517; U.S.D.A. v. Moreno, supra, 413 U.S. at 533, 37 L.Ed.2d 996, 93 S.Ct. at 2825.

Similarly under all of these formulations, the limits of the states' discretion to enact classifications are exceeded only when the classifications are "arbitrary," "invidious," or "irrational." Gregory, supra, ___ U.S. at ___, 115 L.Ed.2d at 430, 111 S.Ct. at 2406; Allegheny, supra, 488 U.S. 336, at 344, 102 L.Ed.2d at 697, 109 S.Ct. 633; City of Cleburne, supra, 473 U.S. at 440, 87 L.Ed.2d 313, 105 S.Ct. at 3254; Lehnhausen, supra, 410 U.S. at 360, 35 L.Ed.2d 351, 93 S.Ct. at 1004; Reed v. Reed, supra, 404 U.S. 71, 76, 30 L.Ed.2d 225, 92 S.Ct. 251, 254; Dandridge, supra, 397 U.S. at 485, 25 L.Ed.2d 491, 90 S.Ct. at 1161; Allied Stores of Ohio, supra, 358 U.S. at

527, 3 L.Ed.2d 480, 79 S.Ct. at 441; see also Ferguson v. Skrupa, 372 U.S. 726, 732, 10 L.Ed2d 93, 83 S.Ct. 1028, 1032 (1963); Williamson v. Lee Optical, 348 U.S. 483, 489, 99 L.Ed. 563, 75 S.Ct. 461, 475 (1955).

B. All formulations of the traditional test have in common a requirement that four elements be present in order to justify the differential treatment.

Regardless of the particular formulation that might be used, the cases decided by this court show that there are four elements that must be present in order to pass the traditional equal protection test. The first two elements define the nature of the purpose that must support the differential treatment. The second two elements define the nature of the rational relationship that must exist between the differential treatment and the purpose offered to support it.

First, there must be some broad or independent purpose behind the classification. The purpose must be something more than the mere intent to enact the different

treatment itself. It must connect the classification -- the means -- with a larger goal -- the end -- that expresses some value or at least a minimal sense of fairness. See Zobel, supra, 457 U.S. at 71, 72 L.Ed.2d at 672, 102 S.Ct. at 2318 (Brennan, concurring); Cleburne, supra, 473 U.S. at 452 fn. 4, 87 L.Ed.2d at 313 fn. 4, 105 S.Ct. at 3261 fn. 4 (Stevens, concurring). This amicus curiae has found no case in which the court's majority opinion discussed whether the purposes offered to justify unequal treatment were lacking in this regard. Perhaps this is because this element is so obvious that few defenders of a state enactment would offer such a flimsy justification, or because the court has felt that such a justification, if offered, was not worthy of discussion.

Nevertheless, Amador Valley may have run afoul of this requirement when it suggested that basing property taxes on the "acquisition value" of property could be justified because "the annual taxes which a

property owner must pay should bear some rational relationship to the original cost of the property...." 22 Cal.3d at 235. The problem here is that the "original cost" is just a different way of saying "acquisition value," and it does nothing to connect the means to a greater end. The purported "original cost" or "original purchase price" justification, to the extent that it is stated as above without any embellishments, is a synonym for the classification, not a reason for it. (See and compare WKR Amicus Brief I, at pages 27-28, where the "original purchase price" justification is stated and analyzed with embellishments.)

Second, the purpose offered for the discrimination must be legitimate. In several cases, this court has invalidated state enactments on equal protection grounds when it found that the purpose offered was not legitimate. See Moreno, supra, 413 U.S. at 534, 37 L.Ed.2d 996, 93 S.Ct. at 2826 ("a bare ... desire to harm a politically unpopular group cannot constitute a legitimate

governmental interest"); Zobel, supra, 457 U.S. at 63-64, 72 L.Ed.2d 672, 102 S.Ct. at 2314-15 (the desire "to reward citizens for past contributions ... is not a legitimate state purpose"); Metropolitan Life, supra, 470 U.S. at 875-80, 84 L.Ed.2d 751, 105 S.Ct. at 1680-82 ("the only question before us is whether those purposes are legitimate;" ... "promotion of domestic business within a State, by discrimination against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose"); Cleburne, supra, 473 U.S. at 448, 87 L.Ed.2d 313, 105 S.Ct. at 3258-59 ("But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently...").

Third, the purpose must be furthered in some reasonable degree by the classification or difference in treatment. In several cases, the court has invalidated state enactments when it found that the classifi-

cation did not further the alleged purpose. Moreno, 413 U.S. at 535-38, 37 L.Ed.2d 996, 93 S.Ct. at 2826-27 ("... classification does not operate so as to rationally further the prevention of fraud"); Jimenez v. Weinberger, 417 U.S. 628, 635-36, 41 L.Ed.2d 363, 94 S.Ct. 2496, 2501 (1974) (conclusively denying one group of afterborn illegitimate children an opportunity to establish their dependency while deeming another group to be dependent without an actual showing of dependency does not serve the purpose of preventing spurious claims); Zobel, supra, 457 U.S. at 61-62, 72 L.Ed.2d 672, 102 S.Ct. at 2313-14 (state's interest in providing financial incentive for individuals to establish and maintain Alaska residence "is not in any way served by granting greater dividends to persons for their residency during the 21 years prior to the enactment"); Williams v. Vermont, 472 U.S. at 24-27, 86 L.Ed.2d 11, 105 S.Ct. at 2472-74 (Vermont's sales and use tax structure did not serve the purpose of providing disincen-

tives to Vermont residents' purchasing outside the state); Hooper, supra, 472 U.S. at 619, 86 L.Ed.2d 487, 105 S.Ct. at 2866-67 (purpose of encouraging veterans to move to state not served by retroactive legislation; the legislation may actually have discouraged such moves).

Fourth, the purpose must help to explain why it is fair or reasonable for one person to suffer a greater burden or enjoy a greater benefit than another. This is the most critical element in the analysis of Proposition 13. It has already been discussed in detail. See WKR Amicus Brief I, at pages 9-16. To satisfy this element, the purpose must lead naturally or logically to the selection of the particular classification used in the enactment and provide a reason for the differential treatment; or looking at it from a different perspective, there must be a difference between the differently treated classes with respect to the purpose offered that provides a reason for the differential treatment.

With these elements in mind, the next step is to analyze Proposition 13 using the traditional equal protection test.

C. <u>The goal of preventing people from being taxed out of their homes fails to justify the unequal treatment.</u>

Perhaps the most emotionally laden justification offered for Proposition 13 is that the tax limitation measure was and is necessary in order to prevent people from losing their homes due to an inability to pay excessively high taxes. That is definitely a legitimate goal, and it provides a good reason for placing limits on tax increases. But on three counts, it does not provide a good reason for making the new buyers pay higher taxes than the long-term owners.

First, making new buyers pay higher taxes means that some people who otherwise could afford to buy a home will be unable to do so, because they can't afford the higher taxes; and some who can just barely afford to buy will be strapped to the limit and may have difficulty holding onto their <u>new</u> homes

because of the higher taxes. Yet getting a new home and keeping one's old home are actions that occur on the same continuum. Both of these actions are undertaken to satisfy the fundamental human need for shelter. Whether one is attempting to satisfy this need by holding onto one's old home or by getting a new home, the interest is the same and is entitled to the same protection. The fact that one person bought her home in 1975 while another bought in 1991 has no bearing at all on the existence or importance of this need when these individuals seek to satisfy it in 1991 by getting a new home or keeping an old one. Thus, the goal of helping the long-term owners keep their old homes in no way implies that it is appropriate to hinder new buyers from acquiring new homes. On the contrary, the basic need experienced by all homeowners demands that, if one person is given protection against high taxes, then all should be given a similar protection,

regardless of when they purchased their homes.

Second, hindering new buyers from getting and keeping new homes tends to defeat the goal of helping long-term owners keep their homes, since it makes it harder for people to become long-term owners with homes to keep.

Third, letting long-term owners pay low taxes while making new buyers pay high taxes protects those who already have a lot at the expense of those who in comparison have little or nothing. Where the issue relates to a basic need such as housing, such an approach turns basic concepts of fairness upside down. A 50-year old who, after years of scrimping and saving, is finally just barely able to buy her first home is surely entitled to at least as much protection from high taxes that threaten her ability to get or keep her home, as is the 50-year old who has enjoyed the good fortune of having owned a home for 15 years.

Therefore, the goal of protecting long-term owners from losing their homes to higher taxes fails to justify the Proposition 13 inequalities, because it does not provide a reason for making new owners pay higher taxes.

D. <u>The goal of providing certainty and predictability fails.</u>

Another purported justification -- one that was used in <u>Amador Valley</u> -- goes essentially like this (22 Cal.3d at 235):

> Proposition 13 provides certainty and predictability in the computation of future taxes. It "enable[s] each property owner to estimate with some assurance his future tax liability."

As with the others, this is a seemingly plausible justification, but again, on closer analysis, it fails to do the job.

It may be conceded that the Proposition 13 tax computation formula in general serves the purpose of enabling property owners to estimate their future taxes with some reasonable degree of certainty and predictability. It must be noted, however, that there are many other formulas that would serve the purpose as well or better. For

example, at least one formula could be developed that would, with an equal degree of certainty and predictability, result in long-term property owners paying higher taxes than new buyers. And the simplest formula -- the one that gives the highest degree of certainty and predictability -- is to have everyone pay exactly the same amount of tax, year in and year out, with no discrimination at all.

The traditional equal protection test, of course, does not require that the state pick the formula that serves the asserted purpose best. It does, however, require that the purpose provide some semblance of a reason for selecting the discrimination that has been employed. Unfortunately for the supporters of Proposition 13, the goal of providing certainty and predictability does not provide even the faintest reason for selecting the formula that prefers long-term owners over new buyers. There is nothing in this goal that points to new buyers and suggests that they ought to pay higher taxes

than long-term owners. There is nothing in this goal that leads naturally or logically to choosing the Proposition 13 tax computation formula over any other formula. Indeed, if certainty and predictability were the only goal, then that goal points to another formula -- the formula under which taxes are the same each year and the same for everyone, without any discrimination. Furthermore, there is no difference whatsoever between new buyers and long-term owners with respect to the goal of achieving certainty and predictability. On the contrary, everyone is equally interested in certainty and predictability, so on that basis, everyone ought to be paying equal taxes.

The analysis of this case is very much like the analysis in Reed v. Reed, supra, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251. There, while the classification in question served the goal of reducing the probate court's workload, that goal nevertheless failed to explain why men were chosen over women, since the stated goal could have been

served equally well by choosing women over men and there was no difference between men and women that had any bearing on any statutory purpose. Here, the goal of providing certainty and predictability likewise fails to explain why long-term owners are preferred over new buyers. The goal of providing certainty and predictability therefore fails to justify the Proposition 13 inequalities.

E. <u>The goal of preventing increases in taxes fails.</u>

Another justification offered for the Proposition 13 inequalities goes something like this: Each purchaser of property, beginning at the moment of purchase, has a legitimate and important interest in seeing that his or her property taxes do not increase significantly from one year to the next; Proposition 13 is designed to protect this interest by preventing large and unexpected increases in taxes.

There are at least two fatal flaws in this purported justification.

First, the Proposition 13 inequalities and the classification that creates them do nothing to prevent tax increases. Under Proposition 13, tax increases are prevented by fixing the tax rate at 1% of the assessed value and by limiting the yearly increases in assessed value to 2%. The inequalities are created by Proposition 13, however, only when the reassessment on sale provision is added into the formula in an economy where the yearly inflation exceeds 2%, so as to create huge differences in assessed values. The reassessment on sale provision classifies taxpayers by dividing them into groups based on the date of purchase, and at the same time, it creates the inequalities by letting early buyers pay low taxes and making later buyers pay high taxes. The reassessment on sale provision thus does not help prevent tax increases; rather, it directly <u>facilitates</u> tax increases. It causes an increase in the taxes payable with respect to any newly acquired property. It causes a tax increase for any long-term

owner who sells his old home and buys a new one -- even when the replacement home is of lesser value than the first home. It causes an increase in new taxes for all of the first time buyers who waited perhaps a month, perhaps a year or more longer than they originally anticipated before buying their first home. Had they bought earlier, their first-time taxes as well as their current year taxes would have been lower, and well do they know that fact.

The second fatal flaw resembles the flaw that undermines all of the other purported justifications: there is nothing in the goal of preventing tax increases that suggests that new buyers should have a base year or starting point for the computation of their taxes that is different from the long-term owners' base year or starting point, and there is nothing in that goal that suggests that new buyers should pay higher taxes than long-term owners. Similarly, there is no difference between the respective classes that suggests that

any difference in treatment is appropriate; on the contrary, all taxpayers are equally interested in avoiding tax increases, so they all should be treated equally with regard to the increases to which they are exposed.

Thus, the goal of preventing tax increases fails to justify the Proposition 13 inequalities.

F. <u>The goal of increasing local revenues fails.</u>

A final justification offered for Proposition 13's inequalities is this: Proposition 13's reassessment on sale provision and the inequalities that it creates help to raise local government revenues, thus providing a stable revenue source.

Clearly, in offering this as a justification, the defenders of Proposition 13 believe that the Equal Protection Clause requires only a pragmatic justification for any discrimination: if it works, use it. But such an approach would mean that <u>any</u> discrimination could be justified -- even a

formula that assigned different tax obligations to the various taxpayers by an outright lottery, or by some equivalent, such as by birth date, or by social security number, or by the first letter in one's last name -- or as under Proposition 13, by date of acquisition of property. Assigning tax amounts by lottery would certainly help raise money without imposing an undue burden on everyone.

Clearly, however, this view of the Equal Protection Clause is wrong. The rational relationship that must exist between the discrimination and the purpose offered to support it requires more than just a pragmatic connection. The purpose offered to support the discrimination must provide a reason not just for making some choice, but for making the particular choice actually made. And the reason must convey a sense that some approximation of fairness has been achieved. Any child knows that the bare need for money never explains why it is

fair or reasonable to take more from one person than from another.

G. Lumping several goals together fails.

Perhaps out of a subconscious understanding that there is no real justification for Proposition 13, the Jarvis and Gann organizations advance a unique argument in support of Proposition 13. First, citing Amador Valley, they argue that Proposition 13 is made up of four major elements that are interlocking and inseparable. HJTA Amicus Brief I, at page 7. Next -- and this is the unique aspect of the argument -- they argue that the purposes behind Proposition 13 are likewise interlocking and inseparable and must be considered together. HJTA Amicus Brief I, at pages 7-9, 11-14. The purposes they identify are those already discussed in this brief (above, pages 31 - 42) and in the previous brief by this amicus curiae (WKR Amicus Brief 1, pages 27-34). The picture they paint is of an intricate structure of policies and devices to further those policies that must be

considered as a whole, rather than one piece at a time.

The problem for these Proposition 13 defenders, however, is the same whether their cherished purposes are taken one at a time or as a group. Singly, none of the purposes explains why it is fair or reasonable to make new buyers pay higher taxes than long-term owners. And no wonders of alchemy occur when these purposes are added together and taken as a group: they still give no reason to hit the new buyer with high taxes. These Proposition 13 defenders make their best case with the pragmatic justification for Proposition 13, but under the Equal Protection Clause, that is not enough. In the end, the only likely effect of their argument will be to dig the grave deeper for Proposition 13 as a whole, when this court finds that one of its non-severable parts is constitutionally invalid.

H. Cleburne requires reversal of the lower court.

In Cleburne, supra, this court considered a local zoning ordinance which required

a special use permit to operate hospitals for the insane, feebleminded, alcoholic, or drug-addicted persons in the R-3 zone, while allowing other kinds of hospitals, sanitariums, nursing homes, and convalescent homes, as well as fraternity and sorority houses and dormitories, in the R-3 zone without a special use permit. The operator of a home ("hospital") for mentally retarded ("feebleminded") persons was denied a special use permit in that zone and sued the city, claiming an equal protection violation. 473 U.S. at 436-37, 87 L.Ed.2d 313, 105 S.Ct. at 3252.

The city offered several justifications for the special use permit requirement, among them, to protect against locating facilities in flood plains, to control residential densities, to avoid concentration of population, to lessen congestion on the streets, to protect against fire hazards, and to preserve the serenity of the neighborhood. 473 U.S. at 449-50, 87 L.Ed.2d 313, 105 S.Ct. at 3259-60. Clearly,

these were legitimate governmental purposes. Also, the special use permit requirement served these purposes by enabling the city to condition or deny applications that unduly threatened these public health and welfare concerns. To that extent, the classification in Cleburne served these legitimate governmental purposes.

One by one, however, the Cleburne court rejected each of these purposes, because none of them provided any reason at all for treating homes for the mentally retarded differently from the other group living facilities. The court stated:

> "This concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherstone home and, for example, nursing homes.... The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disabilities not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent.... [T]he ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals, and the like, may freely locate in the area without a permit...."

473 U.S. at 449-50, 87 L.Ed.2d 313, 105 S.Ct. at 3259-60.

The problem in the present case is the same as the problem in Cleburne. Proposition 13 is designed to serve a number of legitimate governmental purposes, and it does in fact serve them. But none of these purposes provides a reason for treating new buyers differently from long-term owners. None of the legitimate concerns underlying Proposition 13 is based on any distinction between new buyers and long-term owners. And, while there are some differences between new buyers and long-term owners, there is no difference between them that warrants imposing higher taxes on new buyers than on long-term owners. As in Cleburne, then, the unequal treatment found in the present case cannot be sustained.

VII. CONCLUSION.

The justifications that have been offered for Proposition 13, through their failure to do the job, show clearly the true

nature of Proposition 13: it is an opportunistic grab into every California real estate escrow. The state grabs out of each escrow not just immediate cash, but an enduring commitment to pay taxes in the amounts set at that time. New buyers have the motivation to pay the taxes, however unfair the taxes might be; they have the money to pay the taxes demanded of them; and their choices are severely limited. Further, Proposition 13 confers real benefits on just enough people, holds out enough hope to others, and camouflages its inequities well enough, so that most people would pay rather than fight.

New buyers are motivated to buy property. Ownership of one's home is the American dream. From a social, financial, and psychological perspective, the advantages of owning one's home for most people so far outweigh the alternative that, when the opportunity presents itself, people will buy. The purchase price of the house itself is the major expense, and new buyers are not

going to quibble about a smaller item such as taxes, particularly when they have no choice about that item. In a sense, not having to quibble about taxes is a relief, for there are enough sources of anxiety to go around whenever one purchases a house. So making new buyers pay higher taxes grabs them at a point where they are particularly vulnerable. They really have no option: even though they don't like the tax inequalities, they can't refuse to buy.

New buyers have the money to pay the taxes, for one simple reason: fortunately for the state, there is an army of commercial lenders whose commodity -- loans to help buy houses -- is essential in the purchase of most homes. These commercial lenders do their best to make sure that no one buys a house with their loans unless the buyer can afford to pay <u>all</u> the monthly payments -- mortgage, insurance, <u>and taxes</u>. The state can set taxes as high as it wants, and the army of lenders will do its job, making sure that only those buyers qualify

who have sufficient ability to pay. Everyone else is simply swept under the rug. When the defenders of Proposition 13 argue that Proposition 13 is fair because the new buyers are able to pay the high taxes, the answer is, "Of course, they are able to pay the high taxes. The lenders -- not the Proposition 13 tax computation formula -- make sure of that." But the lenders do not make similar determinations in the current year for other current year taxpayers. Therefore, the fact that new buyers are able to pay the current year's high taxes says nothing about the ability or inability of others to pay, and it doesn't make Proposition 13 fair or reasonable.

New buyers' choices are severely restricted. While they can choose from the properties that are available in the current year at current year prices, obviously they cannot go back in time and choose from properties at 1975 prices. They are stuck in the current year real estate market, unless they want to wait, hoping for an

economic catastrophe that would drive prices back down to 1975 levels. The more likely prospect, however, is that prices may remain fairly stable or decline slightly in the short run and go up even higher in the long run.

Proposition 13 offers real benefits to some, and the hope for future benefits to others. Those who bought in 1975 or before clearly benefit from Proposition 13 -- and many of these people still own their homes. Others who bought later than that, while still in the early stages of rapid inflation, also benefit from Proposition 13, though in lesser degrees. However, in recent years, inflation of housing prices has slowed somewhat. Proposition 13 now offers to the new buyer a lottery's chance that later buyers will get stuck holding a bigger tax bill, with no assurances that such will soon be the case. Today's new buyers may spend their entire time of home ownership in the highest tax brackets, and some of these will no doubt sell just before

rapid inflation begins again. In any event, however, none of these real or anticipated benefits negates or justifies the real inequalities that occur under Proposition 13. Rather, the very existence of these benefits depends upon the inequalities created by Proposition 13 and is indeed the very source of the injury to those who do not receive these benefits.

Proposition 13 camouflages its inequities well. In every real estate escrow, there are many fingers in addition to the seller's, reaching in to take money out: loan fees, prior liens, termite inspections, homeowner's insurance, title insurance, escrow fees, recording fees, as well as taxes. Nearly all of these fingers are private sector fingers, and none of these private sector fingers are subject to the constitutional requirement of equal protection. They can be as arbitrary as they want -- and they are, and the buyer knows it. It is very easy in this context to minimize the arbitrariness of Proposition 13's real

estate taxes -- the arbitrariness of these taxes is no different in degree from the arbitrariness of the purchase price paid by the buyer to the seller for the home itself. So what harm if Proposition 13's taxes are not fair? Who said life was fair? Unfortunately for the defenders of Proposition 13, and fortunately for the rest of us, government is not permitted to act arbitrarily. The constitution, of course, does not favor one social or economic theory over another, and it permits the states wide leeway to implement any kind of theory the state deems appropriate. But there is one economic or social theory that the states are not free to implement, and that is the theory that says government can act like the private sector without restraint from the Equal Protection Clause.

Without a doubt, the facts presented by Petitioner show that Proposition 13 violates the Equal Protection Clause. It treats people unequally, the inequalities keep getting worse, and there is no justification

for that unequal treatment. It is plainly and simply an opportunistic approach to taxation, not based even remotely on any principle of fairness or reason. In holding otherwise, Amador Valley was wrong and should therefore be disapproved. In the present case, the trial court's decision sustaining the demurrer was wrong, and the court of appeals decision upholding the trial court was wrong. These decisions must be reversed. Proposition 13 should be declared invalid.

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Respectfully submitted,

William K. Rentz